Barat Estates Sdn Bhd & Anor v Parawakan a/l Subramaniam & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-422 OF 1998
GOPAL SRI RAM, AHMAD FAIRUZ AND HAIDAR JJCA
26 MAY 2000

Labour Law *— Employment — Termination of employment — Change of ownership — Automatic continuation of employment with new owner of business, whether recognised by Employment Act 1955 — Whether due notice of termination is mandatory — Whether employees were entitled to indemnity*

The respondents were employed by the appellants on two estates. In September 1990, the first appellant sold both estates to Prospell Enterprise Sdn Bhd ('Prospell'). The first appellant wrote a letter to the respondents informing them of the sale of the estates to Prospell and said that the change of ownership would not affect the terms and conditions of the respondents' service. The letter went on to say that the respondents' employment would continue as if there had been no change in the employer. Prospell also wrote to the respondents offering them to continue their employment. All the respondents accepted Prospell's offer. Later, they commenced an action against the appellants. They claimed an indemnity under s 13(1) of the Employment Act 1955 ('the Act') on the ground that the appellants had failed to give them notices of termination of their contracts in accordance with s 12 of the Act. The appellants resisted the claim principally on the ground that there had been no break in the continuity of their contracts of service. The respondents had therefore suffered no actual loss of employment. Since there was no loss, no question of indemnity arose. The issue before the High Court was whether the appellants were obliged to indemnify the respondents under s 13(1) of the Act. The judge answered that question in the respondents' favour and accordingly entered judgment for the respondents. The appellant appealed.

Held, dismissing the appeal:

(1) Section 12(3) of the Act makes it clear in the context of para (f) that where there is a termination of service because of a change in the ownership of the business in which the employee is employed, the employer must give the employee the appropriate period of notice. Accordingly, having the purpose of the Act in mind, it is apparent that Parliament has conferred upon an employer the duty to give his employee due notice of termination in the event of a sale of the relevant business. It is the right of the employee to receive a notice of termination of the appropriate length as prescribed by sub-s (2) of s 12 in the event that the business in which he is employed is sold off to a third party. It is apparent that the section does not recognize the automatic

continuation of employment with the new owner of the business (see p 116E–G). A

(2) When viewed in its proper context, the result intended by the Act in the provisions is entirely in keeping with the constitutional rights of an employee. A failure to give notice deprives the employee of his right to make a choice. This contravenes art 6 of the Federal Constitution (see pp 116H, 117A–B). B

(3) The first appellant's attempts to evade the operation of ss 12 and 13 of the Act by means of the device of placing the respondents in continued employment with Prospell was without avail. The appellants, upon sale of the business were under a statutory obligation to terminate the contracts of service of each of the respondents by giving them the appropriate notice. Since they failed to do so, they were under an obligation to indemnify the respondents to the extent prescribed by s 13(1) of the Act (see p 118E–F). C D

[Bahasa Malaysia summary

Responden-responden telah digaji oleh perayu-perayu di dua estet. Pada bulan September 1990, perayu pertama telah menjual dua estet tersebut kepada Prospell Enterprise Sdn Bhd ('Prospell'). Perayu pertama telah menulis kepada responden-responden memberitahu mereka mengenai penjualan estet-estet tersebut kepada Prospell dan menyatakan bahawa perubahan pemilikan tidak akan menjejaskan terma-terma dan syarat perkhidmatan responden-responden. Selanjutnya surat tersebut menyatakan bahawa penggajian responden akan berterusan seolah-olah tiada perubahan di dalam majikan. Prospell juga menulis kepada responden-responden menawarkan untuk meneruskan penggajian mereka. Semua responden menerima tawaran Prospell. Kemudian, mereka memulakan suatu tindakan terhadap perayu-perayu. Mereka telah menuntut tanggungan rugi di bawah s 13(1) Akta Pekerjaan 1955 ('Akta tersebut') atas dasar bahawa perayu-perayu gagal untuk memberikan notis-notis penamatan kontrak-kontrak mereka menurut s 12 Akta tersebut. Perayu-perayu telah menentang tuntutan tersebut pada asasnya atas alasan bahawa tidak terdapat pemecahan di dalam penyambungan kontrak-kontrak perkhidmatan mereka. Dengan itu, responden tidak mengalami kehilangan pekerjaan yang sebenar. Oleh kerana tidak terdapat kerugian, tiada persoalan tanggungan rugi timbul. Isu di hadapan Mahkamah Tinggi adalah sama ada perayu-perayu terpaksa menanggung rugi responden-responden di bawah s 13(1) Akta tersebut. Hakim menjawab persoalan tersebut dengan memihak kepada responden-responden dan dengan itu memasuki penghakiman untuk responden-responden. Perayu telah merayu. E F G H I

Diputuskan, menolak rayuan tersebut:

(1) Seksyen 12(3) Akta tersebut menyatakan dengan jelas di dalam konteks para (f) bahawa di mana terdapat penamatan perkhidmatan kerana terdapat suatu perubahan pemilikan di dalam perniagaan di mana pekerja digaji, majikan tersebut mestilah memberikan pekerja tersebut tempoh notis yang sesuai. Maka, dengan mempertimbangkan tujuan Akta tersebut, adalah jelas bahawa Parlimen telah meletakkan ke atas majikan kewajipan untuk memberikan pekerjanya notis penamatan yang kena diberi di dalam keadaan penjualan perniagaan yang relevan. Adalah hak pekerja untuk menerima notis penamatan dengan tempoh yang sesuai seperti yang diperuntukkan oleh sub-s (2) kepada s 12 jika perniagaan di mana beliau digaji dijual telah kepada pihak ketiga. Adalah jelas bahawa seksyen tersebut tidak mengakui penerusan penggajian secara automatik dengan pemilik baru perniagaan tersebut (lihat ms 116E–G).

(2) Apabila melihat di dalam konteksnya yang wajar, kesan yang diniatkan oleh Akta tersebut di dalam peruntukan-peruntukan tersebut adalah selari dengan perlindungan hak-hak perlembagaan seorang pekerja. Kegagalan untuk memberikan notis merampas hak pekerja akan haknya untuk membuat suatu pilihan. Ini adalah bercanggah dengan perkara 6 Perlembagaan Persekutuan (lihat ms 116H, 117A–B).

(3) Cubaan-cubaan perayu pertama untuk pelepasan daripada operasi ss 12 dan 13 Akta tersebut dengan cara meletakkan responden-responden di dalam penggajian yang berterusan dengan Prospell adalah sia-sia. Perayu-perayu selepas penjualan perniagaan tersebut adalah di bawah kewajipan statutori untuk menamatkan kontrak-kontrak perkhidmatan setiap responden dengan memberikan mereka notis yang sewajarnya. Oleh kerana mereka gagal berbuat demikian, mereka adalah di bawah kewajipan untuk menanggung rugi responden-responden setakat apa yang diperuntukkan oleh s 13 Akta tersebut (lihat ms 118E–F).]

Notes

For cases on termination of employment generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 886–942.

Cases referred to

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1 (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 (refd)

Hendry v De Cruz [1949] MLJ Supp 25 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)
Lionel v Government of Malaysia [1971] 2 MLJ 172 (refd)
Menon v The Brooklands (Selangor) Rubber Co Ltd [1968] 1 MLJ 15 (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)
Radtha d/o Raju & Ors v Dunlop Estates Bhd [1996] 1 MLJ 561 (refd)
Ridge v Baldwin [1963] 2 All ER 66 (refd)
Said Dharmalingam Abdullah v Malayan Breweries (Malaya) Sdn Bhd [1997] 1 MLJ 352 (refd)
Stock v Frank Jones (Tipton) Ltd [1978] 1 WLR 231 (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)
Workmen of Indian Standards Institution v Management of Indian Standards Institution [1976] 1 LLJ 36 (refd)
Young v Bristol Aeroplane Co Ltd [1944] 2 All ER 293 (refd)

Legislation referred to

Employment Act 1955 ss 7, 10, 11, 12, (1), (2), (3)(f), 13(1), 14(1)
Federal Constitution arts 6, (2), 8(1)
Industrial Relations Act 1967
Interpretation Acts 1948 and 1967 ss 2(1), 17A
Revision of Laws Act 1968

Appeal from: Writ of Summons No S5–22–305 of 1996 (High Court, Kuala Lumpur)

N Sivabalah (*Shaik Azrin* with him) (*Shearn Delamore & Co*) for the appellants.
M Rajasingam (*M Rajasingam & Co*) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court): An elaborate argument has been addressed in support of this appeal. In essence it is an invitation for us to depart from the majority judgments of this court in *Radtha d/o Raju & Ors v Dunlop Estates Bhd* [1996] 1 MLJ 561. The background against which the invitation rests consists of facts that are not in serious dispute.

The respondents; and there are 336 of them; were at all material times employed by the first appellant on two estates. These were the Ulu Yam Estate and the Bukit Beruntung Estate. The first appellant owned both estates. But the second appellant managed them. In September 1990, the first appellant sold both estates to a company known as Prospell Enterprise Sdn Bhd, or Prospell for short. On 6 November 1990, the first appellant wrote a letter to the respondents. It informed the respondents of the sale of the estates to Prospell. It said that the change of ownership would not affect the terms and conditions of the respondents' service. The letter went on to say that the respondents' employment would continue as if there had been no change in the employer.

A On the very next day, ie 7 November 1990, Prospell wrote to the respondents. Its letter is similar to that written by the first appellant. Apart from informing the respondents that it was the new owner of the two estates, it offered the respondents, with effect from 7 November 1990, to continue their employment with no change in their terms and conditions of service, as if there had been no change in the employer.

B All the respondents accepted Prospell's offer. Later, they commenced an action against the appellants. They claimed an indemnity under s 13(1) of the Employment Act 1955 ('the Act') on the ground that the appellants had failed to give them notices of termination of their contracts in accordance with s 12 of the Act.

C The appellants resisted the claim principally on the ground that there had been no break in the continuity of their contracts of service. The respondents had therefore suffered no actual loss of employment. Since there was no loss, no question of an indemnity arose.

These rival contentions were presented before James Foong J, at a trial D in which witnesses were called by both sides. However, the issue that emerged at the conclusion of the trial resolved itself into a question of law. It is whether, on the facts as found by the learned judge, the appellants were obliged to indemnify the respondents under s 13(1) of the Act. The learned judge answered that question in the respondents' favour. Accordingly, he entered judgment for the respondents. In arriving at his conclusions, he E considered himself bound by the majority decision of this court in *Radtha d/o Raju & Ors v Dunlop Estates Bhd.* We must say at once that the learned judge was entirely correct in his approach since he acted in obedience to the doctrine of stare decisis and judicial discipline.

Before us, it has been argued that the construction that the learned F judge placed on ss 12 and 13 of the Act amounts to a misdirection in law. This is, as we said earlier, a frontal attack on the correctness of the majority view expressed in *Radtha d/o Raju*'s case. It therefore behoves us to reconsider the question afresh with a view of ascertaining whether this is an appropriate case for us to depart from an earlier decision of this court.

The circumstances in which we may embark upon such course is not in G doubt. They are set out in the judgment of Lord Greene MR in *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 at p 298:

> The Court of Appeal is a creature of statute and its powers are statutory. It is one court though it usually sits in two or three divisions; each division has co-ordinate jurisdiction, but the full court has no greater powers or jurisdiction H than any division of the court. Its jurisdiction is mainly appellate, but it has some original jurisdiction. To some extent its decisions are final (for example, in appeals in bankruptcy and from the county courts), but in the majority of cases there is an appeal from its decisions to the House of Lords either with the leave of the Court of Appeal or of the House of Lords. Neither in the statute itself nor (save in two cases mentioned hereafter) in decided cases is there any suggestion that the powers of the Court of Appeal sitting with six or I nine or more members are greater than those which it possesses when sitting as a division with three members. In this respect, although we are unable to agree with certain views expressed by Greer LJ as will presently appear, we

think that he was right in saying that what can be done by a full court can equally well be done by a division of the court. The corollary of this is, we think, clearly true, namely, that what cannot be done by a division of the court cannot be done by the full court.

In considering the question whether or not this court is bound by its previous decisions and those of courts of co-ordinate jurisdiction, it is necessary to distinguish four classes of case. The first is that with which we are now concerned, namely, cases where this court finds itself confronted with one or more decisions of its own or of a court of co-ordinate jurisdiction which cover the question before it, and there is no conflicting decision of this court or of a court of co-ordinate jurisdiction. The second is where there is such a conflicting decision. The third is where this court comes to the conclusion that a previous decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords. The fourth (a special case) is where this court comes to the conclusion that a previous decision was given per incuriam. In the second and third classes of case it is beyond question that the previous decision is open to examination. In the second class, the court is unquestionably entitled to choose between the two conflicting decisions. In the third class of case the court is merely giving effect to what it considers to have been a decision of the House of Lords by which it is bound. The fourth class requires more detailed examination and we will refer to it again later in this judgment.

The Malayan Court of Appeal in *Hendry v De Cruz* [1949] MLJ Supp 25 applied the rule in *Young v Bristol Aeroplane Co Ltd.* Willan CJ said (at p 27):

> The question whether the Court of Appeal in England should be bound to follow its own decisions remained in doubt until 1944 and was then settled by the case of *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718. The appeal in that case first came on for hearing before Lord Greene, Master of the Rolls, and Lords Justices MacKinnon and Goddard. In view of its importance, the appeal was eventually argued before a full court consisting of Lord Greene, Master of the Rolls, and Lords Justices Scott, MacKinnon, Luxmoore, Goddard and du Parcq. The judgment of the court was delivered by Lord Greene, who, after stating at p 723:
>
> > 'The question thus raised as to the jurisdiction of this court to refuse to follow decisions of its own was obviously one of great general importance and directions were given for the appeal to be argued before the full court. It is surprising that so fundamental a matter should at this date still remain in doubt.'
>
> said at p 729:
>
> > 'On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize: (i) the court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (ii) the court is bound to refuse to follow a decision of its own which, though not expressly over-ruled, cannot, in its opinion, stand with a decision of the House of Lords; and (iii) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.'

An appeal was preferred to the House of Lords against the decision of the Court of Appeal on other points, but it is interesting to note that Lord Simon agreed with the judgment of the Court Appeal that that Court is bound by its own decisions — see *Young v Bristol Aeroplane Co Ltd* [1946] AC 163 at p 169:

> 'One of the conclusions reached in the judgment of the Master of the Rolls, with which I agree, is that if the Court of Appeal, when sitting in one of its divisions, has in a previous case pronounced on a point of law which necessarily covers a later case coming before the court, the previous decision must be followed (unless, of course, it was given *per incuriam*, or unless the House of Lords has in the meantime decided that the law is otherwise), and that this application of the rules governing the use of precedents binds the full Court of Appeal no less than a division of the court as usually constituted.'

In *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1, Peh Swee Chin FCJ, when delivering the judgment of the Federal Court said (at p 12):

> The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.
>
> The said exceptions are as decided in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. The part of the decision in *Young v Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956 vide its s 3.
>
> To recap, the relevant ratio decidendi in *Young v Bristol Aeroplane* is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given per incuriam need not be followed; secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one; thirdly it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v Bristol Aeroplane.*
>
> A few words need be said about a decision of Court of Appeal made per incuriam as mentioned above. The words 'per incuriam' are to be interpreted narrowly to mean as per Sir Raymond Evershed MR in *Morelle v Wakeling* [1955] 2 QB 379 at p 406 as a 'decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong'. It should be borne in mind that the year of *Morelle*'s case is 1955 whereas our s 3 of the Civil Law Act was enacted in 1956. The ratio in *Morelle*'s case is also part of the common law applicable to us.

In the light of the foregoing observations, what we propose to do is to examine the issue presented to us for determination without any reference to the views expressed by the majority in *Radtha d/o Raju*'s case. Having done so, we will then examine and express our views upon the decision in *Radtha d/o Raju*.

The starting point of our inquiry must surely be the relevant provisions of the Act. These are s 12 (in particular sub–s (3)(f)) and s 13(1) which read as follows:

> 12(1) Either party to a contract of service may at any time give to the other party notice of his intention to terminate such contract of service.
>
> (2) The length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service, or, in the absence of such provision in writing, shall not be less than —
>
> (a) four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given;
>
> (b) six weeks' notice if he has been so employed for two years or more but less than five years on such date;
>
> (c) eight weeks' notice if he has been so employed for five years or more on such date:
>
> Provided that this section shall not be taken to prevent either party from waiving his right to a notice under this subsection.
>
> (3) Notwithstanding anything contained in sub-s (2), where the termination of service of the employee is attributable wholly or mainly to the fact that —
>
> ...
>
> (f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law,
>
> the employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than that provided under subsub–s (2)(a), (b) or (c), as the case may be, regardless of anything to the contrary contained in the contract of service.
>
> (4) Such notice shall be written and may be given at any time, and the day on which the notice is given shall be included in the period of the notice.
>
> 13(1) Either party to a contract of service may terminate such contract of service without notice or, if notice has already been given in accordance with s 12, without waiting for the expiry of that notice, by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice or during the unexpired term of such notice.
>
> (2) Either party to a contract of service may terminate such contract of service without notice in the event of asny wilful breach by the other party of a condition of the contract of service.

A The Act is intitled as 'an Act relating to employment'. A perusal shows that it contains provisions that are designed to afford protection to an employee. Thus, for example, s 7 of the Act strikes down terms and conditions in a contract of service that are less favourable than those prescribed under the Act. It confers protection upon an employee by first requiring a contract of service that exceeds one month to be in writing (s 10) and regulates the B period during which a contract of service is to remain extant (s 11). The Act in s 12, makes a contract terminable only upon notice and prescribes the length of such notice according to the duration of the contract. And in s 13, the Act requires the payment of an indemnity in the event of a termination without notice.

C Further, the Act in s 14(1) requires due inquiry to be held before an employee is dismissed. This is at variance with the rule at common law under which, 'The fact that the master has not heard the servant in his own defence is irrelevant; the criterion is whether facts emerging at the trial prove breach of contract. If the facts do not warrant summary dismissal, the master must pay damages; see *Ridge v Baldwin* [1963] 2 All ER 66 at p 71' D (per Raja Azlan Shah J, as he then was, in *Menon v The Brooklands (Selangor) Rubber Co Ltd* [1968] 1 MLJ 15 at p 16). See also *Said Dharmalingam Abdullah v Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 MLJ 352.

The scheme of the Act thus when viewed as a whole, is to afford protection to persons employed under a contract of service. Hence, the Act E is designed to afford a degree of security of tenure that is not available to a servant at common law. It is therefore plain that the Act is a piece of beneficent social legislation. As such, its provisions must, in accordance with well-settled principles, receive a broad and liberal interpretation that enhances its avowed object. It is what Lord Simon in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, 236 referred to as the 'functional F construction of a statute'.

In *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 at p 368, the Federal Court when considering another piece of beneficent social legislation, namely, the Industrial Relations Act 1967, applied the dictum of Bhagwati J in *Workmen of Indian Standards Institution* G *v Management of Indian Standards Institution* [1976] 1 LLJ 36 at p 43:

> [I]t is necessary to remember that the Industrial Disputes Act 1947 is a legislation intended to bring about peace and harmony between management and labour in an 'industry' so that production does not suffer and at the same time, labour is not exploited and discontented and, therefore, the tests must be so applied as to give the widest possible connotation to the term 'industry'. H Whenever a question arises whether a particular concern is an 'industry', *the approach must be broad and liberal and not rigid or doctrinaire. We cannot forget that it is a social welfare legislation we are interpreting and we must place such an interpretation as would advance the object and purpose of legislation and give full meaning and effect to it* in the achievement to (sic) its avowed social objective. (Emphasis added.)

I We are of the view that the approach that commended itself to the Federal Court on that occasion should apply in the instant case when interpreting the provisions of the Act. Further, there is an express statutory directive in

the form of s 17A of the Interpretation Acts 1948 and 1967 which requires us to adopt a purposive approach to the construction of statutes. That section reads as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the act or not) shall be preferred to a construction that would not promote that purpose or object.

The section appears in Part I of the Interpretation Acts 1948 and 1967, which, by s 2(1) thereof applies for the interpretation of all laws whenever enacted and revised under the Revision of Laws Act 1968. The Act is such a law, having been revised in 1981.

It is with the foregoing matters in mind that we must now approach the construction of ss 12 and 13 of the Act.

Section 12(1) of the Act permits either party to a contract of service to terminate it by giving notice. And s 12(2) sets out the appropriate period of notice that ought to be given depending upon the duration of the contract. It is true that s 12(1) uses the term 'may' in relation to the giving of notice. Ex facie that implies permissiveness. However, when that expression is read with the purpose that the legislature had in mind when passing the Act, there can be no doubt as to what s 12(1) is meant to convey. It is that notice must be given if the relationship created by a contract of service is to be brought to an end. In other words, the phrase 'may at any time' appearing in s 12(1) means that notice shall be given if either party wishes to terminate the contract. This is apparent when sub-s (1) of s 12 is read in the light of the compelling provisions of sub-s(2).

Section 12(3) which begins with a *non obstante* clause makes it clear in the context of para (f) that where there is a termination of service because of a change in the ownership of the business in which the employee is employed, the employer must give the employee the appropriate period of notice. Accordingly, having the purpose of the Act in mind, it is apparent that parliament has conferred upon an employer the duty to give his employee due notice of termination in the event of a sale of the relevant business. To put it another way, it is the right of the employee to receive a notice of termination of the appropriate length as prescribed by sub-s (2) of s 12 in the event that the business in which he is employed is sold off to a third party. It is apparent that the section does not recognise the automatic continuation of employment with the new owner of the business.

When viewed in its proper context, the result intended by the Act in the provisions now under consideration is entirely in keeping with the constitutional rights of an employee. One begins with the premise that every employee has a right to choose his employer. And no person may dictate to another that he shall be the employee of the former. When an employer sells off his business to another, he must give his employees the right to make a choice as to the course he or she wishes to adopt. The employee may, because of an existing relationship, wish to be employed by the former employer in some other business that such employer may have. Or he may wish to seek employment elsewhere altogether. Or he may wish to remain

A in the same business under a fresh contract with the acquirer of the business. The giving of notice by the former employer upon the sale of a business thus enables the employee to exercise his right to the choice that he is entitled to make. A failure to give notice deprives the employee of his right to make a choice.

B We spoke a moment ago of the right to make a choice in the context of employment as a constitutional right. In saying this we have in mind art 6 of the Federal Constitution. It reads:

(1) No person shall be held in slavery.

(2) All forms of forced labour are prohibited, but parliament may by law C provide for compulsory service for national purposes.

(3) Work incidental to the serving of a sentence of imprisonment imposed by a court of law shall not be taken to be forced labour within the meaning of this article.

(4) Where by any written law the whole or any part of the functions of any D public authority is to be carried on by another public authority, for the purpose of enabling those functions to be performed the employees of the first mentioned public authority shall be bound to serve the second mentioned public authority, and their service with the second mentioned public authority shall not be taken to be forced labour within the meaning of this article, and no such employee shall be entitled to demand any right from either the first mentioned or the second mentioned public authority E by reason of the transfer of his employment.

In accordance with settled principles of constitutional interpretation, this article must be given a broad and liberal construction. See *PP v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697. F Additionally, this article, like most other Articles of the Federal Constitution, must be read in the light of the humanising and all pervading provisions of art 8(1). See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481.

G Of course, art 6(2) prohibits forced labour. That much is clear on a reading of its plain words. However, upon closer examination it does more than that. When the principles of construction established by our courts are applied to the article, it reveals a further meaning. By its spirit and intendment it vests in an employee the right to be employed by an employer of his choice. That is because compelling an employee to work for a H particular employer, without affording him a choice in the matter, is merely one form of forced labour.

The only situation where the supreme law permits the deprivation of a choice of employment is in the specific circumstance set forth in cl 4. In all other cases, it would be unconstitutional for one employer to compel his I employee to continue his employment with another employer. Hence, any written law or other State action or any arrangement (whether made pursuant to public or private law) under which an employee is deprived of

the right of choice vested in him by art 6(2) would fall foul of the supreme law and be liable to be struck down or declared invalid.

We emphasise the inclusion of arrangements governed by private law within the scope of the principle because it is not open to parties to contract out of the provisions of the Federal Constitution. That much was made clear by Ong CJ in *Lionel v Government of Malaysia* [1971] 2 MLJ 172 at p 173:

> Just as it is impossible to contract out of the provisions of rent control legislation, a fortiori must the terms of the appellant's appointment (including reg 36 of General Orders, Chapter D) be invalid where it is inconsistent with the Constitution.

It is in recognition of the constitutional right that the Act expressly preserves in an employee the choice of his employer. This it does in a case where an employer disposes of his business by treating it as a termination of employment calling for the giving of a notice of appropriate duration and by making no provision recognising an arrangement under which the employee is to continue his employment with the acquirer of the business. Further, the Act, in obvious recognition of the valuable nature of such right, vests in the employee the right to be indemnified by his former employer for the loss of the right.

Following the steps through which we have thus far taken the argument, we arrive at the conclusion that the first appellant's attempts to evade the operation of ss 12 and 13 of the Act by means of the device of placing the respondents in continued employment with Prospell is without avail. Put shortly, the appellants, upon sale of the business were under a statutory obligation to terminate the contracts of service of each of the respondents by giving them the appropriate notice. Since they failed to do so, they are under an obligation to indemnify the respondents to the extent prescribed by s 13(1) of the Act.

It follows from what we have said thus far that our conclusion upon the effect of ss 12 and 13 of the Act coincides with the majority view expressed in *Radtha d/o Raju & Ors v Dunlop Estates Bhd.* The route by which we have reached our decision may be different. But our conclusions are the same. And to reflect this we need do no more than to quote a passage from the judgment of Shaik Daud JCA in *Radtha d/o Raju*'s case. It appears at p 570 of the report:

> It is my view that the object of this subsection is to protect the employee in case of change of ownership of a particular business or part of that business. It is to provide security in his employment. If no notice is required to be given then I feel that his position as employee will be neither here nor there. There ought to be a termination under one employer and if necessary the beginning of one under the new employer. Otherwise as in the present case if anything were to happen to an employee say on 3 September 1990 it is debatable under whose employment would be considered. Secondly I would think that such a notice would be necessary in order to give the employee an alternative as he may not wish to be employed by the new employer. Therefore it is my view that the subsection is to safeguard the employee's position.

A The crucial issue to be determined in the circumstances of the present case is whether there is a termination of service of the appellants when Dunlop sold the estate to IOI-Dynamic. In the light of the clear admission that the appellants ceased to be employed by Dunlop after 31 August 1990, I for my part would agree with the submission by learned counsel for the appellants that a fact of termination had occurred and once this happens, the provisions B of s 12(3)(f) must be operative and Dunlop is duty bound by law to issue notice of termination with effect from 1 September 1990.

With respect we express our complete agreement with that statement of our learned brother. It is not only the common law result of statutory interpretation: it is common sense as well.

C For the reasons given, we reject the invitation addressed to us by counsel for the appellants to depart from the decision in *Radtha d/o Raju*'s case. The result is that this appeal fails. It is dismissed. The orders of the court below are affirmed. The appellant must bear the costs of this appeal. The deposit is to be paid out to the respondents to account of their taxed costs.

D *Appeal dismissed.*

Reported by Jafisah Jaafar

E

F

G

H

I